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92-46

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VIRGINIA SMITH (WIDOW OF LINDEL SMITH) (DECEASED), JERRY LYNN SMITH, LARRY WAYNE SMITH, TINA MARIE SMITH, JIMMIE DARRELL SMITH, AND BELINDA JOY MANTEJA,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit erred in dismissing an appeal *sua sponte* based on jurisdictional grounds because the claimant in the proceedings below died before the filing of the Notice of Appeal and no motion was made to substitute claimant's statutory successors as the appellants within the timeframe to file a notice of appeal, even though the notice of appeal was timely filed and the appellee acknowledged that it knew the identity of the appellants and the nature of the claim being appealed?

LIST OF PARTIES TO THE PROCEEDING

Parties Below:

Mrs. Virginia Smith (widow of Lindel Smith) was, until her death, a party to the administrative proceedings giving rise to this appeal. After the Notice of Appeal was timely filed indicating that she was deceased, her children and statutory successors to her claim, Jerry Lynn Smith, Larry Wayne Smith, Tina Marie Smith, Jimmie Darrell Smith and Belinda Joy Manteja sought unsuccessfully to be substituted for her. The respondent is the Director, Office of Workers' Compensation Programs, United States Department of Labor ("Director").

Parties Before This Court:

The same parties as below, including the statutory successors of Virginia Smith who were denied substitution, are parties to the proceedings before this Court. The respondent before this Court is the appellee below.

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OCTOBER TERM, 1991

VIRGINIA SMITH (WIDOW OF LINDEL SMITH) (DECEASED), JERRY LYNN SMITH, LARRY WAYNE SMITH, TINA MARIE SMITH, JIMMIE DARRELL SMITH, AND BELINDA JOY MANTEJA,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners by their undersigned attorney petition for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 10, 1992 (rehearing denied April 3, 1992).

OPINIONS BELOW

The opinion of the Court of Appeals (No. 91-3978) dated February 10, 1992 is reproduced in Appendix A. The opinion of the Benefits Review Board, (BRB No. 86-0443

BLA; OWCP No. 407-07-1654) dated August 22, 1991, is reproduced in Appendix B. The opinion of the Administrative Law Judge (Case No. 83-BLA-499; OWCP No. 403-07-4041) dated January 14, 1986, and the Department of Labor's original denial of benefits, dated November 11, 1981, are reproduced in Appendix C. The Circuit Court's order denying petitioner's petition for rehearing, dated April 3, 1992, is reproduced in Appendix D. The Notice of Appeal filed with the Sixth Circuit Court of Appeals, dated October 21, 1991, is reproduced in Appendix E. Also, the Director's Response to Motion for Substitution of Parties Due to Death of Petitioner is reproduced in Appendix F. The Director's Appellate Brief of Respondent is reproduced in Appendix G.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals was filed February 10, 1992, and the petition for rehearing was denied on April 3, 1992. This petition has been filed within 90 days of the date of the order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The Federal Rules of Appellate Procedure at issue in this case are as follows:

Fed. R. App. P. 3. Appeal as of Right—How taken

> (a) An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not effect the validity of the appeal, but is ground only for such action

as the court of appeals deems appropriate, which may include dismissal of the appeal . . . .

(c) The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken . . . .

Fed. R. App. P. 15. Review or Enforcement of Agency Orders

(a) **Petition for Review of Order; Joint Petition.** Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

Fed. R. App. P. 43. Substitution of Parties

(a) **Death of a Party.**

* * *

If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed

by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

STATEMENT OF THE CASE

A. Chronology

Lindel Smith was a coal miner for over 12 years. App. B at 3 n.3. He died on August 22, 1960. On March 6, 1981 his widow, Virginia Smith, filed a claim for benefits under the Federal Coal Mine Health & Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Black Lung Benefits Act"), alleging that at the time of Lindel Smith's death he was totally disabled due to pneumoconiosis caused by working in the coal mines. On November 11, 1981, the Deputy Commissioner of the Department of Labor denied Ms. Smith's claim. On October 19, 1982, Ms. Smith appealed this denial to the Office of the Administrative Law Judges for a formal hearing. On January 14, 1986, the Administrative Law Judge ("ALJ") also denied the benefits.

On February 12, 1986, Ms. Smith appealed the ALJ's decision to the Benefits Review Board ("Board"). Before the Board, the Director and Ms. Smith agreed that the ALJ had erred, and both parties requested a remand. App. B at 2 n.1. Virginia Smith died on May 14, 1988. App. F at 1. On August 22, 1991, ten years after the case was filed, notwithstanding the agreement of the parties that error had been committed below, the Board issued its opinion affirming the ALJ's order. App. B. On October 21, 1991, counsel filed a Notice of Appeal in the Sixth

Circuit Court of Appeals[1] indicating that Ms. Smith was deceased. App. E. On December 3, 1991, along with Ms. Smith's opening brief, her children who succeeded to her claim pursuant to the regulatory scheme promulgated under the statutory authority of the Black Lung Benefits Act, filed their motion for substitution. The Director did not oppose the substitution and acknowledged that he had actual knowledge of the nature and identity of the appellant within the appropriate time period. App. F at 5-6. The Director did, however, suggest the possibility of a jurisdictional question because of "unsettled law". *Id.* at 8.

On February 10, 1992, the Sixth Circuit Court of Appeals, *sua sponte*, dismissed the appeal from Ms. Smith's denial of benefits with prejudice. App. A. Claimants' Petition for Rehearing and Suggestion for Rehearing En Banc were denied on April 3, 1992. App. D.

The Notice of Appeal (App. E) provided in relevant part:

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[1] Petitioners' appellate brief noted that the Sixth Circuit Court of Appeals had subject matter jurisdiction over the appeal pursuant to Section 932(a) of the Black Lung Benefits Act (30 U.S.C. § 932(a)), incorporating Section 921(c) of the Longshoremen's and Workers' Compensation Act. (33 U.S.C. § 921(c)).

Virginia Smith (widow of Lindel Smith) (deceased),	)	
Petitioner-appellant,	)	BRB No. 86-0443 BLA
	)	OWCP No. 407-07-1654
v.	)	
Director, Office of Workers' Compensation Programs United States Department of Labor,	)	
Respondent-appellee.	)	

NOTICE OF APPEAL

VIRGINIA SMITH hereby petitions this Honorable Court for review of the Order of the United States Department of Labor Benefits Review Board affirming the previous ruling of the Administrative Law Judge denying her claim for benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* The Benefits Review Board Order was entered on August 22, 1991.

Both parties to the appeal agreed that error had been committed by the administrative agency and the case should be remanded.[2] The appellee also acknowledged that the Notice of Appeal, which was timely filed, provided actual notice that Ms. Smith, the only claimant, was appealing her claim, the only claim in the case. App. F at 5-6. Rather

[2] Respondent's appellate brief stated: "The case must be remanded to the ALJ for a proper determination of whether the lay evidence establishes that the miner was totally disabled at the time of his death due to a respiratory impairment arising out of his coal mine employment." App. G at 10.

than remand the case as requested by both parties, the Sixth Circuit dismissed the appeal *sua sponte* based on its belief that the claimant's failure to file a Rule 43 motion for substitution of parties within the time period for filing a notice of appeal rendered the court without jurisdiction to entertain the case. App. A.

In dismissing the appeal, the Sixth Circuit relied solely on a previous Sixth Circuit case, *Minority Employees v. Tennessee Dept. of Employment Sec.*, 901 F.2d 1327 (6th Cir. en banc), *cert. denied*, 111 S. Ct. 210 (1990). The Sixth Circuit cited no precedent for elevating Rule 43, governing substitution, to a jurisdictional level requiring dismissal of a timely filed appeal. This Court has not addressed this issue.

Further, the appellate court did not discuss or even cite to this Court's opinions in *Torres v. Oakland Scavenger Co.*, 482 U.S. 312, 108 S. Ct. 2405 (1988), or *Smith v. Barry*, 112 S. Ct. 678 (1992), or its own more recent opinion in *Adkins v. United Mine Workers of Am.*, 941 F.2d 392 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1180 (1992), all of which hold that a Notice of Appeal serves its purpose if it is timely filed and apprises the court and the opposing party of the nature and extent of the appeal. Here the Director concedes that the timely filed Notice of Appeal served this function. It is Petitioners' position that the result reached by the Circuit Court was clearly erroneous and conflicts with the principles expressed in *Torres*, *Barry*, and *Adkins*, as well as the opinions of other circuit courts.

B. Controlling Law

There is no controlling law on the issue of whether the failure to substitute parties within the time provided for filing a notice of appeal renders the appeal jurisdictionally

defective. The Sixth Circuit's *sua sponte* dismissal with prejudice of a coal miner's deceased widow's appeal when a notice of appeal was timely filed by counsel and provided actual notice to all parties of the parties to and nature of the appeal is without precedent.

Analogous situations have been presented to the appellate courts for the Second and Tenth Circuits, and in each case the courts found that they were not divested of jurisdiction when an appellant died prior to entry of judgment in the district court and the notice of appeal was filed in the deceased party's name prior to substitution. *Slade v. United States Postal Service*, 952 F.2d 357, 359-60 (10th Cir. 1991); *Ciccone v. Secretary of Dept. of Health and Human Serv.*, 861 F.2d 14, 15 (2d Cir. 1988). In both *Slade* and *Ciccone* the courts found that they had jurisdiction to decide appeals on the merits even though the appellant died before the appeal was filed and substitution was not sought in the district court. *Cf. Hardie v. Colter and Co.*, 849 F.2d 1097, 1098 n.2 (8th Cir. 1988) (court reviewed merits of appeal of deceased plaintiff-appellant without formal substitution); *Wright v. Commercial Union Ins. Co.*, 818 F.2d 832, 839 n.1 (11th Cir. 1987) (plaintiff-appellee died while appeal was pending, but court proceeded with appeal despite failure to substitute); *Coffee v. Cutter Biological*, 809 F.2d 191, 193 n.1 (2d Cir. 1987) (one of two plaintiffs died while claim was pending in district court, but appeal proceeded in both names without substitution).[3]

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[3] Although respondent cited to *Kowaleski v. Director, Office of Workers' Compensation Programs*, 879 F.2d 1173 (3rd Cir. 1989), *cert. denied*, U.S. 1070, 110 S. Ct. 1114 (1990) in its response to the motion for substitution, it agrees that that opinion is inapposite to the present one. App. F at 6. In *Kowaleski*, a former coal miner filed a claim for black lung benefits in his own name in 1978. His wife died in 1979. The miner died in 1985 before the Administrative Law Judge denied the claim in an opinion that inexplicably

(Footnote continued on following page)

Accordingly, in the instant case, where both parties' acknowledgments of error below were ignored by both the Benefits Review Board and now the appellate court and the appellee acknowledges the notice of appeal provided actual notice of the identity of the appellants (through the successor in interest regulations provided at 20 C.F.R. § 725.545), there is no controlling law supporting the appellate court's summary *sua sponte* refusal to order the remand that both parties have requested since 1986.

The *Minority Employees* opinion on which the Sixth Circuit based its dismissal in this case was founded on this Court's opinion in *Torres*. It is petitioners' position that it is clear error to apply the *Minority Employees/Torres* rule to dismiss an appeal when the notice is timely filed and the appellee acknowledges that the notice provided actual notice that the successors in interest were pursuing the only claim that could be pursued, especially when both sides request a remand to correct error below. The appellate court's reliance on *Minority Employees*, however, may require an analysis of the controlling law providing that the province of a notice of appeal is to provide func-

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[3] *continued*

identified the claimant as the miner's widow. *Id.* at 1174. In fact the miner's wife, having predeceased him, was never his widow. For some reason the case continued through the Benefits Review Board in the name of the claimant's wife and a notice of appeal in the Circuit Court was filed captioned "Anna Kowaleski, Widow of Peter Kowaleski". The court refused to allow the substitution of Peter Kowaleski's executor for Anna Kowaleski, because Anna had never been a party to any proceedings before the court or the administrative agency. Thus, the Third Circuit dismissed the appeal. *Id.* at 1177.

By contrast, in the instant case the miner's widow filed the initial claim at the administrative level and has cognizable rights which pass to her successors. To the extent that *Kowaleski* is applicable to the instant case, it creates an irrevocable split between the Third and Sixth Circuits and the Second and Tenth Circuits.

tional notice of the nature and identity of parties to an appeal. This analysis underscores the error committed by dismissal of this appeal since the notice provided actual notice, which renders the instant result in conflict with this Court's teachings.

In *Torres*, this Court held that an appellate court does not have jurisdiction to hear an appeal if the notice of appeal fails to give fair notice of the identity of the appellant as required by Rule 3(c) of the Federal Rules of Appellate Procedure. The Court stated: "The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal." *Id.* at 318, 108 S. Ct. at 2409. In *Torres*, the Notice of Appeal named only 15 of the 16 possible appellants. This omission was not cured by the use of "et al." Thus, the sixteenth (unnamed) appellant could not appeal because neither the opposing counsel nor the court had fair notice that the unnamed appellant was appealing his claim.

In *Minority Employees*, decided shortly after *Torres*, the Sixth Circuit held that it lacked jurisdiction to hear the appeal of parties below who were not specifically named in the notice of appeal. The court held that the use of "Now come plaintiffs in the above case," combined with *et al.* in the caption, was insufficient as functional notice because the description provided no notice of how many potential plaintiffs were appealing the lower court's decision. *Id.* at 1335-36.

Subsequently, in *Adkins v. United Mine Workers of America*, 941 F.2d. 392 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1180 (1992), the Sixth Circuit found a notice of appeal to be sufficient to vest jurisdiction with the court when the notice, although not naming the individual appellants, provided that "all of the plaintiffs to this action"

appealed from the district court's ruling. Recognizing the functional purpose of a notice of appeal, the *Adkins* court found that since the notice alerted the defendants that all plaintiffs sought to appeal, it comported with the notice requirements. *Id.* at 398.

Without citing *Torres* or *Adkins*, the Sixth Circuit in the instant case relied on the language of *Minority Employees* to *sua sponte* reject jurisdiction when the Notice of Appeal indicated that the only appealable claim was being appealed and the opposing counsel conceded fair notice. In *Minority Employees*, the court hedged its decision by noting that it was "[w]ithout further clarification by the Supreme Court beyond its language in *Torres*." *See Minority Employees*, 901 F.2d at 1331. Although this clarification came later with this Court's decision in *Smith v. Barry*, 112 S. Ct. 678 (1992), the Sixth Circuit did not even cite to *Barry* in the instant case.

In *Barry*, this Court emphasized that, "[w]hile a notice of appeal must specifically indicate the litigant's intent to seek appellate review, (citation omitted), the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts." *Id.* at 682. Despite this further clarification by the Supreme Court, the Sixth Circuit in the present case did not cite to, or discuss, *Smith v. Barry*.

Pursuant to the Black Lung regulations, Ms. Smith's claim passed to her children. *See* 20 C.F.R. 725.545. Petitioners, through their counsel, now petition this Court for writ of certiorari to correct the Sixth Circuit's error in its *sua sponte* dismissal when the timely filed notice of appeal provided more than sufficient notice of the nature and identity of the parties because the decision conflicts with this Court's rulings, the opinions of other circuit courts of appeal, and the Sixth Circuit's own precedent.

REASONS FOR GRANTING THE PETITION

I. In Applying the Jurisdictional Prerequisite Rule of Fed. R. App. P. 3(c) to the Substitution Requirements of Rule 43, The Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court, and the Decision Conflicts with the Decisions of Other Circuits.

This Court has never addressed the question of whether Fed. R. App. P. 43 is jurisdictional in nature, or whether it should be liberally construed like its counterpart in the Federal Rules of Civil Procedure, Fed. R. Civ. P. 25(a). The circuits that have addressed the issue have held, unlike the Sixth Circuit in the instant case, that an appellate court can decide an appeal on the merits if an appellant dies before the district court opinion is issued, a timely notice of appeal is filed in the deceased party's name, and proper substitution is effected after the notice of appeal is filed. *Slade v. United States Postal Serv.*, 952 F.2d 357 (10th Cir. 1991). *Ciccone v. Secretary of Dept. of Health and Human Serv.*, 861 F.2d 14 (2d Cir. 1988). The Sixth Circuit's opinion in this case cannot be reconciled with these opinions and results in an even more indefensible result than a dismissal in a case that is appealed from a district court.

When a party dies while his or her case is pending in a district court that party can seek substitution at the district court level pursuant to Fed. R. Civ. P. 25(a). In the instant case, however, the proceedings before the Benefits Review Board, before which the case was pending when the miner's widow died, is governed by the regulations promulgated pursuant to the Black Lung Benefits Act. The Regulations, unlike the Federal Rules, make no provisions for substitution upon death of a party.[4] The only

[4] Respondent has acknowledged that the regulations do not include any provision for the substitution of parties. App. F at 4 n.2.

reference in the Black Lung Benefits regulations that remotely discusses the effect of the death of a party states:

> "An appeal [to the Benefits Review Board] may be dismissed on the death of a party only if the record affirmatively shows that there is no person who wishes to continue the action and whose rights may be prejudiced by dismissal."

20 C.F.R. 802.402. Thus, if any inference can be drawn from the regulations, it is that appeals should not be dismissed upon the death of a party when their successors in interest wish to continue the appeal. The deprivation of a hearing on the merits in a claim that has been mired in agency proceedings since 1981 violates all notions of due process and fundamental fairness when the regulations governing the claim presume continuation of the action upon death of a claimant without formal substitution.

Rule 43(a) of the Federal Rules of Appellate Procedure governs substitution after the death of a party. This rule, like its counterpart in the Federal Rules of Civil Procedure, (Fed. R. Civ. P. 25(a)), was intended to provide relief from the inflexible requirements of its predecessor.[5]

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[5] *See* Fed. R. App. P. 43(a) advisory committee's notes (suggesting Rule 43(a) procedure is similar to that under Fed. R. Civ. P. 25(a)); *and* Fed. R. Civ. P. 25(a) advisory committee's notes to 1963 Amendment (intent to provide relief from previous rule's "hardships and inequities"). The old F.R.C.P. 25 required that the motion for substitution be filed within two years of the party's death. (*See* Fed. R. Civ. P. 25 advisory committee's notes to the 1963 Amendment; *Cheramie v. Orgeron*, 434 F.2d 721, 723 (5th Cir. 1970)). If this was not done, the court was required to dismiss the action as "to the deceased party." *See Cheramie*, 434 F.2d at 723. The 1963 Amendment to Fed. R. Civ. P. 25 was intended to provide relief from "[t]he hardships and inequities of this unyielding requirement," by "establish[ing] a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death is provided by

When the Federal Rules of Appellate Procedure were adopted, the drafters intentionally carried over the liberal nature of Fed. R. Civ. P. 25(a) to Fed. R. App. P. 43(a) governing substitution at the appellate level. In fact, the appellate rule explicitly allows a deceased party's attorney of record to file an appeal on their behalf, with substitution to take place *after* the notice of appeal is filed. Where this occurs, neither the court nor the appellee can know the name of the appellant. However, as the rule acknowledges, that is not necessary at the time the notice is filed. What is necessary is that the court and the appellee know which claim is being appealed from which case. In the instant case it is not disputed that all concerned knew that the only claim that could be appealed was being appealed, and that both parties requested a remand to correct errors below.

If the Sixth Circuit's interpretation of *Torres* is allowed to be extended to issues governing substitution, the appellate rule governing substitution will be far more harsh than even the former Fed. R. Civ. P. 25(a). Under the Sixth Circuit's interpretation in the instant case, if a party dies before an appeal is filed, and that party's attorney for the appeal files a timely notice of appeal in the name of the deceased party, the notice does not confer jurisdiction over the appeal even though all parties involved are notified of the extent and nature of the appeal. This could not have been the intent of the drafters of Rule 43 and cannot be squared with the letter or the spirit of the

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[5] *continued*
means of a suggestion of death upon the record." Fed. R. Civ. P. 25 advisory committee's notes to the 1963 Amendment; *see also Rende v. Kay*, 415 F.2d 983, 986 (D.C. Cir. 1969) (the amendment was intended to prevent the dismissal of otherwise meritorious actions).

Tenth and Second Circuits' opinions in *Slade* and *Coffee*, respectively. Rather, the language of the Rule, the Notes of the Advisory Committee and the presumption of continuation of the claim found in the Black Lung regulations suggest just the opposite.

The Sixth Circuit's extension of the jurisdictional requirements of Rule 3(c) to Rule 43 will lead to the dismissal of meritorious appeals and an increase in litigation over Rule 43 that was never intended by the *Torres* Court or the Drafters of the Rules of Appellate Procedure. In the present case, this erroneous rule will prevent a meritorious appeal from ever being heard by a court despite 12 years of administrative proceedings and agreement between *both* parties that the administrative decision should, at a minimum, be remanded.

Because this Court has never addressed this important question of whether strict compliance with Rule 43 is a jurisdictional prerequisite, the Court should grant this petition for writ of certiorari pursuant to Supreme Court Rule 10.1(c) and reverse the Sixth Circuit's holding.

In addition to the error committed by refusing to allow substitution pursuant to Rule 43(a), the Sixth Circuit's interpretation of Rule 3 in this case conflicts with decisions of other circuits, and even conflicts with the Sixth Circuit's own decision in *Adkins*. Moreover, the sheer number of reported decisions on what constitutes an adequate notice of appeal and the acknowledgment that this is an "unsettled" area of law demonstrates that the issue is important to courts throughout the country.

II. The Sixth Circuit's Opinion Conflicts with Previous Opinions of this Court.

This Court's opinions in *Torres* and *Barry* make clear that the function of a notice of appeal is to provide fair notice to the court and opposing parties of the nature and extent of the claim being appealed. Indeed, it is a fundamental requirement of the due process guarantees of the Fifth Amendment that a party be fairly advised of the claims against him. *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190 (1965).

The Sixth Circuit's dismissal of an appeal, agreed by both sides in this case to be meritorious, rested on its rigid adherence to its prior decision that "identification of the appealing parties in the notice of appeal is a jurisdictional requirement," without regard to the facts before it. *See* App. A at 2, (citing *Minority Employees v. Tennessee Dept. of Employment Sec.*, 901 F.2d 1327 (6th Cir.) (en banc), *cert. denied*, 111 S. Ct. 210 (1990)). This blind adherence to form, and complete disregard of substance, conflicts directly with the principles expressed first in *Torres* and then confirmed in *Barry* that the purpose of the party-specificity requirement in a notice of appeal is to ensure that fair notice of the identity of the appellants and the nature of the claim is given to the court and counsel. The conflict is even more apparent when the appellee acknowledges that the notice at issue *did* provide actual notice that the only claim involved in the case was being appealed. *See Torres*, 482 U.S. 312, 108 S. Ct. 2409; *Barry*, 112 S. Ct. at 682.

In *Torres*, the specificity requirement was not met because the appellant was one of the sixteen plaintiffs with severable claims who lost at the district court level. The notice of appeal never mentioned his name or gave any indication he was appealing from the district court's dis-

missal of his claim. Rather, the notice suggested just the opposite, as fifteen of his co-plaintiff's were specifically mentioned in the body of the Notice of Appeal, and the caption listed only one party followed by the designation "et al." The only logical inference from the *Torres* notice of appeal was that the omitted plaintiff chose not to pursue an appeal.

In reaching the conclusion in *Torres*, the Court was cognizant of the dangers of elevating form over substance as a blanket proposition without regard for the realities of the situation:

> [T]he requirements of the rules of procedure should be liberally construed and . . . 'mere technicalities' should not stand in the way of consideration of a case on its merits.

Torres, at 316, 108 S. Ct. at 2408. Clearly this policy of preferring decisions on the merits over technical dismissals has an *a fortiori* application to a case such as this one when both sides acknowledge administrative error.

Subsequently, in *Barry* this Court found that a brief on the merits filed within the statutory period satisfies the notice of appeal requirements if it provides the required notice to the other parties and the Court. 112 S. Ct. at 682. Since the timely filed notice in this case provided the actual notice, the result cannot be squared with *Barry*, which was not even cited by the Sixth Circuit.

The Sixth Circuit's reliance, without analysis, on the *Minority Employees* opinion directly conflicts with this Court's admonition that the critical inquiry in determining the sufficiency of a notice of appeal is its success in informing the other parties and the court of the identity of the appealing party and the nature of the appeal. In *Minority Employees*, the court addressed essentially the same issue as resolved by *Torres*. Multiple plaintiffs lost

at the district court level, each with the ability to appeal from the adjudication of their individual rights. The notice of appeal, however, named only one plaintiff and included the "et al." designation. There was no notice within the statutory period that alerted the opposing party or the court with any degree of certitude which claims were to be raised in the appeal by which litigants. Accordingly, the court lacked jurisdiction over the unnamed parties.

The Director recognized in his response to claimant's motion for substitution that black lung benefits litigation in general, and this case in particular, simply does not present the same notice problems of the multiparty cases from which these rules developed:

> In our view, dismissal of this case for lack of jurisdiction would be a particularly harsh result. All of the parties to a black lung claim are aware, if not actually then constructively, of the order by which individuals may succeed to the right to black lung benefits in the case of death. 20 C.F.R. ¶ 725.545. Each case appealed to a federal circuit court involves only a single order of the Benefits Review Board, affirming or reversing a decision on a claim for benefits. The problems addressed by the Supreme Court in *Torres* are thus not present in black lung benefits litigation.

See App. F at 6.

The Catch-22 in the present case runs full circle. Since it is the notice of appeal that vests the court with jurisdiction, Ms. Smith's statutory successors cannot be substituted as parties without court approval. However, court approval cannot be given without jurisdiction, and the notice of appeal cannot vest jurisdiction because it cannot be filed in the name of successor parties who are not yet parties to the case. Under the Sixth Circuit's view in the instant case, judicial review of an agency decision is effectively prevented if the claimant dies while the

claim is pending with the Board, because the regulations governing the claim at the Board level do not provide for substitution upon death of a party. Indeed, the regulations presume the continuation of the claim absent an affirmative showing that the successors have contrary intentions. Petitioners respectfully suggest that this result is in direct conflict with the Court's teachings that the province of a notice of appeal is functionality.

As recognized by the Director, only the claim of one miner's widow is at stake in the instant litigation. Notice of an appeal from a Benefits Review Board decision in a black lung claim is notice of the nature and extent of the appeal no matter what name is used in the notice. Denying judicial review solely because the widow died prior to filing the notice of appeal is poor policy, especially where the agency's regulations presume continuation of the claim without formal substitution. Moreover, in rejecting the functional approach to notices of appeal, this bad policy conflicts directly with existing law. *Cf. T.I.M.E. Inc. v. United States*, 359 U.S. 464, 481, 79 S. Ct. 904, 914 (1959) (Black J., Dissenting) ("I am unable to understand why the Court strains so hard to reach so bad a result").

Under Supreme Court Rule 10.1(a), the failure of the Sixth Circuit to follow the decisions of the Supreme Court justifies a grant of this petition for writ of certiorari to reverse the Sixth Circuit's dismissal for want of jurisdiction.

III. The Sixth Circuit's Opinion Conflicts in Principle with Rulings in the Second, Seventh, Ninth and Tenth Circuits.

Since *Torres*, courts have generally agreed that the use of "*et al.*," without more, is not sufficient to confer jurisdiction over unnamed appellants.[6] However, beyond that,

[6] *See Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988); *Shatah v. Shearson/Am. Express, Inc.*, 873 F.2d 550 (2d Cir.

(Footnote continued on following page)

the courts are split as to what is sufficient to confer jurisdiction over an appeal.

Courts in the Second, Seventh, Ninth and Tenth Circuits hold that a reference in the body of the notice to "the plaintiffs" or "the defendants" is sufficient to confer jurisdiction over the appeals of all the plaintiffs or all the defendants because it provides actual notice to the court and opposing parties of the litigants pursuing the appeal. *See Association of Am. Med. Colleges v. Cuomo*, 913 F.2d 55, 55-56 (2d Cir. 1990) ("the defendants in the above matter hereby appeal" was the "functional equivalent" of listing each defendants' name and therefore sufficient to confer jurisdiction over appeals of unnamed defendants); *Hartford Casualty Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 422-424 (7th Cir. 1990) ("the plaintiffs in this action" combined with name of each plaintiff in caption was sufficient to confer jurisdiction over all plaintiffs); *National Center for Immigrants' Rights, Inc. v. INS*, 892 F.2d 814 (9th Cir. 1989) ("defendants in the above-referenced action" was sufficient to confer jurisdiction over appeals of unnamed defendants); *Tri-Crown, Inc. v. American Fed'l Sav. & Loan Ass'n.*, 908 F.2d 578, 579-80 (10th Cir. 1990) ("the Plaintiffs above-named" in body of notice, combined with name of each plaintiff in caption, was sufficient to confer jurisdiction over appeals of all plaintiffs). All of these courts followed the functional approach enunciated in *Torres*.

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[6] *continued*

1989); *Cruz v. Melendez*, 902 F.2d 232 (3d Cir. 1990); *Hendrix v. Yazoo City*, 911 F.2d 1102 (5th Cir. 1990); *Heussner v. National Gypsum Co.*, 887 F.2d 672 (6th Cir. 1989); *Baucher v. Eastern Indiana Prod. Credit Ass'n*, 906 F.2d 332 (7th Cir. 1990); *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283 (8th Cir. 1990); *Meehan v. County of Los Angeles*, 856 F.2d 102 (9th Cir. 1988); *In re Unioil*, 948 F.2d 678 (10th Cir. 1991).

Conversely, courts in the First, Fifth, Sixth and Seventh Circuits have held that references to "the plaintiffs" or "the defendants" is insufficient to confer jurisdiction over unnamed appellants. *See Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988) ("All plaintiffs appeal" was insufficient to confer jurisdiction over appeals of unnamed plaintiffs where some of original plaintiffs had withdrawn at the trial court level); *Barnett v. Petro-Tex Chem. Corp.*, 893 F.2d 800, 802-03 (5th Cir. 1990) ("Troy D. Barnett, et al., Plaintiffs above-named hereby appeal" was insufficient to confer jurisdiction over appeals of unnamed plaintiffs), *cert. denied*, 110 S. Ct. 3274 (1990); *Minority Employees v. Tennessee Dept. of Employment Sec.*, 901 F.2d 1327 (6th Cir. 1990) ("plaintiffs in the above case" was insufficient to confer jurisdiction over the appeals of unnamed plaintiffs), *cert. denied*, 111 S. Ct. 210 (1990); *Bigby v. City of Chicago*, 871 F.2d 54, 56-57 (7th Cir. 1989) ("Plaintiffs and Intervening Plaintiffs hereby appeal" was insufficient to confer jurisdiction over appeals of unnamed plaintiffs and intervenors).[7]

Those courts that take the "functional" approach of *Torres* and the more recent decision of *Smith v. Barry*, 112 S. Ct. 678 (1992) have exercised jurisdiction over appeals of parties not named in the notice of appeal so long as the purpose of Rule 3(c) is satisfied. However, those courts that follow a narrow interpretation of *Torres*, including the in-

[7] While some of these cases can be harmonized, several are in direct conflict with each other. *Compare Association of Am. Med. Colleges v. Cuomo*, 913 F.2d at 55-56 ("the defendants" was sufficiently specific), *with Resolution Trust Corp. v. Sonny's Old Land Corp.*, 937 F.2d 128, 129 (5th Cir. 1991) ("the defendants" was not sufficiently specific). *Also compare National Center for Immigrants' Rights*, 892 F.2d at 815-16 ("defendants" without the definite article "the" was sufficiently specific) *with Minority Employees*, 901 F.2d at 1332-33 ("plaintiffs" without the definite article "the" was not sufficiently specific).

stant case, refuse to exercise jurisdiction over the appeals of unnamed parties whether or not the notice serves its function. By admission of the Director, the notice in the instant case provided more than adequate actual notice to opposing counsel and the court, and thereby goes well beyond the lower functionality standard required of a notice of appeal. The Sixth Circuit's refusal to exercise jurisdiction over this case conflicts with those decisions in the Second, Seventh, Ninth and Tenth Circuits that apply the functional approach of *Torres* and *Barry*.

IV. The Instant Opinion Conflicts with Authority in the Sixth Circuit Itself.

The Sixth Circuit's *sua sponte* dismissal of the instant case without citation to its recent decision in *Adkins* renders the result reached in conflict with its own precedent. In *Minority Employees*, the court found a notice of appeal insufficient on facts similar to *Torres* in that the use of the term "et al." precluded the parties and the court from determining, with the certitude required by the *Torres* holding, who was appealing from the judgment below. The *Minority Employees* holding overruled a previous Sixth Circuit decision where the court had held that the use of "the defendants" was sufficiently specific to confer jurisdiction over the appeals of unnamed defendants. *See Minority Employees*, 901 F.2d at 1330 ("expressly reject[ing] the decision in *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989)").

Then in *Adkins v. United Mine Workers of Am.*, 941 F.2d 392 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1180 (1992), the court held that the use of "all of the Plaintiffs" in the Notice of Appeal was sufficiently specific to confer jurisdiction over the appeals of "all dissatisfied remaining plaintiffs." *Id.* at 398. In distinguishing the situation from that presented by *Torres*, the *Adkins* court

recognized that the notice successfully provided notice sufficient to alert the defendant that all of the plaintiffs sought to challenge the district court's decision. *See Adkins*, 941 F.2d at 392.

The Notice of Appeal in the instant case, like *Adkins*, provided notice with mathematical certitude that the only claim that could be appealed was being appealed. The opposing party recognized both that the notice served its function and error was committed below. Accordingly, the *sua sponte* dismissal in this case is inconsistent with the *Adkins* holding and is manifestly unjust.[8]

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision below. The Sixth Circuit's decision below conflicts with recent Supreme Court precedent, conflicts with decisions in other Circuits, and even conflicts with the Sixth Circuit's own precedent. Despite this Court's opinions in *Torres* and *Barry*, which make clear

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[8] In *Adkins*, Judge Keith, who had joined in the *Minority Employees* dissent, was now in the majority. Judge Krupansky, who had been in the *Minority Employees* majority, was now in the dissent. In lamenting the majority opinion in *Minority Employees*, Judge Martin wrote: "It is ironic that given the inconsistency and lack of clarity in recent appellate opinions . . . we now demand such rigid and superfluous requirements from the attorneys practicing before us." *Minority Employees*, 901 F.2d at 1350 (Martin, J., dissenting).

Highlighting the problems caused by the inconsistent interpretations of *Torres*, Judge Krupansky pleaded: "The bench, the federal bar, and the public have a right to know what the precedent in this circuit dictates as to this jurisdictional issue of importance." *See Adkins* 941 F.2d at 402 (Krupansky, J. dissenting). This court can provide the guidance required for a uniform application of rules governing the contents of a notice of appeal.

that notices of appeal should be examined for their functionality, the Sixth Circuit has blindly refused to exercise jurisdiction over an appeal which both sides agree is meritorious. This decision also engrafts the jurisdictional requirements of Rule 3(c) onto the substitution requirements of Rule 43, without authority and in contravention of the intent of the drafters of the Federal Rules of Appellate Procedure.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 91-3978

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA SMITH (widow of Lindel Smith, deceased),	)	
Petitioner,	)	February 10, 1992
v.	)	ORDER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondent.	)	

BEFORE: KENNEDY and JONES, Circuit Judges; BROWN, Senior Circuit Judge.

A notice of appeal has been filed in the name of Virginia Smith, the claimant for survivor's benefits in this petition for review of a decision of the Benefits Review Board (Board) denying black lung benefits. Five adult children of the claimant now move to be substituted as petitioners based on the death of the petitioner. The Director has filed a response. Although the Director does not object to substitution, a jurisdictional issue is raised which this court must examine.

The claimant died while her appeal was pending before the Benefits Review Board. Subsequently, the Board issued its decision affirming the denial of benefits. The notice of appeal purports to be on behalf of Virginia Smith. Fed. R. App. P. 43(a) provides in part that if a

party dies before filing a notice of appeal, the notice may be filed by either the decedent's personal representative, or, if there is no such representative, by the decedent's attorney.

In the instant case, it was apparently the decedent's adult children, as her personal representatives, who authorized the notice of appeal. Even if this meets the Rule 43 requirements, there is no indication within the notice of appeal that the adult children are the appealing parties. This court has held that the identification of the appealing parties in the notice of appeal is a jurisdictional requirement. *Minority Employees v. Tennessee*, 901 F.2d 1327 (6th Cir.) (en banc), *cert. denied*, 111 S.Ct. 210 (1990). Therefore, this court lacks jurisdiction over the movants. This cannot now be corrected by a motion under Fed. R. App. P. 43 to substitute since the motion to substitute was made after the expiration of the appeal period. To grant the motion in this case would essentially extend the period for appeal, an act this court lacks authority to take. *See Minority Employees*, 901 F.2d at 1337.

There is also no indication in the notice of appeal that the decedent's attorney is the appealing party. For the reasons stated above, failure to provide such notice divests this court of jurisdiction. *See id.*

It is ORDERED that the motion for substitution is denied. It is further ORDERED that this appeal is dismissed *sua sponte* for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

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Clerk

APPENDIX B

U.S. Department of Labor

BRB No. 86-0443 BLA
OWCP No. 407-07-1654

VIRGINIA SMITH (Widow of LINDEL SMITH)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: August 22, 1991
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent.	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Barbara Samuels (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Robert E. Kirschman (David S. Fortney, Deputy Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NEUSNER, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (85-BLA-6884) of Administrative Law Judge Daniel Lee Stewart denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that claimant established twelve and one-quarter years of coal mine employment. Then, based on the date of filing, the administrative law judge applied the permanent criteria found at 20 C.F.R. Part 718 to this claim, and concluded that as there was no relevant medical evidence regarding the existence or extent of a respiratory disability, the only method available to claimant to establish the existence of pneumoconiosis was 20 C.F.R. §718.202(a)(3). The administrative law judge concluded that since claimant failed to establish that she qualified for the benefit of the presumption at 20 C.F.R. §718.305, claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3). Thus, benefits were denied. Claimant appeals, contending that the administrative law judge erred in his evaluation of the lay testimony evidence pursuant to 20 C.F.R. §§718.202 and 718.305. The Director, Office of Workers' Compensation Programs (the Director) responds[1], contending that the administrative law judge erred in applying Section 718.305 to this claim, since claimant failed to establish at least fifteen years of coal mine employment. The Director further asserts that the administrative law judge erred by declining to consider the lay evidence of record pursuant to 20 C.F.R. §§718.202(c), and 718.204(c)(5).

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[1] The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In his Decision and Order, the administrative law judge found that claimant did not qualify for the benefit of the presumption at Section 718.305, and thus did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3).[2] The Director contends that the administrative law judge erred in applying the provisions of Section 718.305 in this case, as claimant did not establish that the miner had engaged in coal mine employment for at least fifteen years.[3] Claimant, on the other hand, asserts that while the administrative law judge correctly found Section 718.305 applicable to this claim, the administrative law judge nevertheless erred in failing to award benefits pursuant to that section. Contrary to the contentions of claimant, Section 718.305 does not contain separate presumptions at subsections (a) and (b). Rather, there is only one presumption at Section 718.305, which is found at subsection (a). Claimant must establish at least fifteen years of coal mine employment to qualify for the benefit of the

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[2] Since there are no x-ray readings, biopsy or autopsy reports, or medical reports of record supporting a finding that the miner suffered with pneumoconiosis, we affirm the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), (a)(2), and (a)(4).

[3] The administrative law judge's finding that claimant established twelve and one-quarter years of coal mine employment is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

presumption at Section 718.305.[4] *See* 20 C.F.R. §718.305; *Gessner v. Director, OWCP*, 11 BLR 1-1 (1987). Thus, we hold that Section 718.305 is inapplicable to the case at bar, as only twelve and one-quarter years of coal mine employment have been established. However, further remand of this case is not necessary, as the evidence of record is insufficient to establish the existence of pneumoconiosis.

Both claimant and the Director assert that as this is a survivor's claim filed prior to January 1, 1982, the administrative law judge erred by declining to consider the lay testimony evidence of record pursuant to Section 718.202(c) in determining whether claimant had established the existence of pneumoconiosis. In the instant case, however, the record contains the medical autopsy report by Dr. Price, in which the miner's lungs were examined. This report did not diagnose the existence of pneumoconiosis.[5] *See* Dir. Ex. 11. Under the facts of this case, we hold that the lay evidence is not sufficient to establish the existence of pneumoconiosis. *See generally Pekala v. Director, OWCP*, 13 BLR 1-1 (1989). Consequently, as claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement under Part 718, we affirm the administrative law judge's determina-

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[4] Contrary to claimant's contention, Section 718.305(b) merely provides an alternative method of establishing one of the three prongs necessary to invoke the presumption under Section 718.305(a), *i.e.*, the existence of a totally disabling respiratory or pulmonary impairment. Thus, even if claimant had successfully met the criteria under subsection (b), fifteen years of coal mine employment must be established to invoke the Section 718.305 presumption.

[5] Dr. Price's examination of the miner's lungs on autopsy yielded a limited diagnosis of "passive congestion". *See* Dir. Ex. 11.

tion that claimant has not established entitlement to benefits.[6] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

FREDERICK D. NEUSNER
Administrative Law Judge

[6] Our affirmance of the administrative law judge's finding at Section 718.202 obviates the need to address the allegations of error pursuant to Section 187.204(c)(5).

APPENDIX C

In the Matter of:	
VIRGINIA SMITH, WIDOW OF LINDEL SMITH,	
Claimant,	Date Issued: January 14, 1986
and	Case No.: 83 BLA 499
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	OWCP No.: 403-07-4041
Party-in-Interest.	

APPEARANCES:

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For the Party-in-Interest

HEARD BEFORE:

Daniel Lee Stewart
Administrative Law Judge

DECISION AND ORDER – REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. Section 901 *et seq.* and the Regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers in this Decision and Order are contained in that Title.

Benefits are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of coal miners. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs arising from coal mine employment.

This case was referred on October 19, 1982, to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Chicago, Illinois, on July 31, 1985, where the parties had full opportunity to present evidence and argument. The findings of fact and conclusions of law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration.

ISSUES

The specific issues presented for resolution are:

1. Whether the miner worked at least 20 years in qualifying coal mine employment;
2. Whether the miner had pneumoconiosis as defined by the Act and regulations;
3. Whether the miner's pneumoconiosis arose out of coal mine employment;

4. Whether the miner was totally disabled; and
5. Whether the miner's death was due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant, Virginia Smith, timely filed her claim for a surviving widow's benefits under the Act on March 6, 1981. (DX 1).[1] The Department of Labor denied the claim on November 11, 1981. (DX 19). Then, on March 27, 1982, Claimant requested a formal hearing. (DX 21).

Mrs. Smith married the deceased miner, Lindel Smith, on February 25, 1941. (Tr. 15; DX 9). He was born on February 4, 1924. (DX 1). She stated that they met one year before they were married. (Tr. 17). At that time, Mr. Smith was working for Shearn Coal Company, in Belton, Kentucky. (Tr. 17). He worked there until late 1946 or 1947. (Tr. 18). He loaded and shoveled coal. (Tr. 18). Claimant testified that she was told that her husband also worked outside the tipple where he shoveled coal into coal cars. (Tr. 19). When he came home from working in the coal mines, Mrs. Smith stated that the deceased's body was covered with coal dust. (Tr. 20).

Claimant stated that her husband then worked for Mulligan Coal Company after Shearn was sold to Mulligan. (Tr. 22). At Mulligan, the miner drilled, shot and blasted coal. (Tr. 33-34). She remembered that Mr. Smith ceased coal mining in 1955. (Tr. 25). There were two or three layoffs but no strikes. (Tr. 36).

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[1] In this decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the transcript of the hearing.

He then moved to Chicago in July of 1956, where he was employed by A. B. Dick as a janitor. (Tr. 26). Mrs. Smith classified this work as light janitorial work that involved sweeping, picking up and moving things. (Tr. 30).

Claimant testified that her husband had a cough since 1947. (Tr. 28). The cough got continuously worse even after he left coal mining. (Tr. 28). They used to enjoy dancing; however, in 1948 or 1949, due to the miner's shortness of breath, they ceased dancing. (Tr. 31-32). Mrs. Smith testified that her husband coughed up black phlegm until the day he died. (Tr. 32). He never went to the doctor because of his respiratory condition. (Tr. 40). She denied that her husband had a serious heart condition. (Tr. 40). At first, she also denied that Mr. Smith's heart condition was the reason for his deferral from serving in the military. (Tr. 40). Then, Claimant testified that she remembered telling the examiner after her husband's death that he knew that he had a heart condition which was one of the reasons for his military deferral. (Tr. 41). When questioned further, Claimant retracted her previous answer and stated that she did not remember her testimony at the coroner's inquest. (Tr. 42). Finally, Claimant stated that her husband was told that he had a heart condition when he was a baby. (Tr. 44).

Jerry Smith, the deceased miner's son, also testified at the hearing. He stated that he was 18 years old when his father died. (Tr. 51). Mr. Smith remembered his father as a weak man. (Tr. 51). He never engaged in physical activities with his brothers. (Tr. 51). He testified that the deceased coughed and spit up on a regular basis. (Tr. 52). The miner was covered with dirt when he came home from work. Mr. Smith stated that his father worked regularly for A. B. Dick without taking time off of work. (Tr. 57).

Ronald Noel, a former co-worker of the deceased miner at A. B. Dick, also testified at the hearing. He was a friend of Mr. Smith's from 1957 until his death in 1960. (Tr. 62). Quite frequently they took breaks together at work. (Tr. 62). He also visited the miner at home and observed him on the job. (Tr. 63). Mr. Noel stated that Mr. Smith was required to push a little wagon or box on wheels. (Tr. 64). He emptied pieces of paper and paper cups in the wagon. (Tr. 64). Mr. Noel also stated that the company had another person who was employed to pick up the containers that were designated for metal scraps. (Tr. 64). Mr. Smith also operated a motor driven scrub machine. (Tr. 65). Mr. Noel stated that the miner had problems breathing and coughing up phlegm. (Tr. 66). He noted this from the moment they met. (Tr. 66). Mr. Smith worked for about an hour or less before he stopped to take a rest. (Tr. 68).

The last oral testimony was provided by Randall Hall, a friend of the miner's son, who knew the family since the fall of 1956. (Tr. 70-71). He stated that Mr. Smith experienced coughing spasms and was short-winded. (Tr. 72). He was not able to walk very far. Mr. Hall never observed the miner in any kind of physical activity. (Tr. 73). He remembered that Mr. Smith played the guitar but started to cough when he sang. (Tr. 73).

Length of Coal Mine Employment

The Act fails to provide any specific guidelines for the computation of a miner's length of coal mine employment. However, the burden of proof in establishing the length of coal mine employment is on the Claimant. *Miller v. Director*, 7 BLR 1-693 (1985). A reasonable method of computation, supported by substantial evidence is sufficient

to support a finding on the length of coal mine employment. *Clayton v. Pyro Mining Co.*, 7 BLR 1-551 (1984). Further, credible testimony about coal mine employment is not necessarily negated by the absence of written records. *Bizzarri v. Matthews*, 7 BLR 1-343 (1984). Although unsupported by documentary evidence, the uncontradicted testimony of a claimant who is a widow may be considered in the determination of a coal miner's length of employment. *Coval v. Pike Coal Co.*, BLR 1-272 (1984).

Based upon a review of all of the pertinent evidence which includes the application for benefits, (DX 1), history of coal mine employment form, (DX 2), birth certificates of the miner's children which indicate that Mr. Smith's occupation was coal mining (DX 7, 8; CX 1), marriage certificate that lists coal mining as Mr. Smith's occupation, (DX 9), social security earnings record, and the oral testimony, I find that Lindel Smith was a coal miner for 12¼ years. Although Mrs. Smith's testimony included allegations relating to the inaccuracy of the social security earnings record, (Tr. 20-25), I give greater weight to the social security earnings statement which only supports 12¼ years coal mine employment. *See Tackett v. Director*, 6 BLR 1-839 (1984). In addition, Claimant has only been credited with coal mine employment during quarters in which his earnings exceeded fifty dollars as reported by the social security earnings statement. *Id.*

Responsible Operator

Claimant's deceased husband was not employed by a coal mine operator after December 31, 1969. Therefore, the Director, Office of Workers' Compensation Programs, will provide for any benefits due Claimant.

State Workmen's Compensation Award

The record does not reflect that Lindel Smith filed a claim for compensation under any state act. Thus, there appears to be no offset for a state worker's compensation award.

Pneumoconiosis, Causation, and Total Disability

Since Claimant filed her application for benefits after March 31, 1980, it must be adjudicated under Part 718 of the regulations. § 718.2.

In establishing entitlement to benefits under Part 718, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Pneumoconiosis is defined by the regulations as:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

Since the claim was filed by a surviving widow prior to January 1, 1982, and the record is void of medical evidence that is directly relevant to the existence or extent of a respiratory disability, § 718.202(a)(3) is the only method which may be used to establish the existence of pneumoconiosis.

Under § 718.202(a)(3), a determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, or 718.306. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis which is not present in this case. However, the documentary evidence and oral testimony must be evaluated under § 718.305(b) which provides:

> In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

In the instant case, the medical evidence consists of a death certificate dated August 22, 1960, wherein carbon monoxide poisoning was listed as the cause of death (DX 10), and a pathological report which indicated that the miner's lungs were passively congested. (DX 11). Since it appears that neither report is relevant to the existence, or the extent of pneumoconiosis or a respiratory disability, Claimant must rely upon lay testimony to establish pneumoconiosis.

I find that the evidence in this case is not sufficient to establish that Mr. Smith suffered from a totally disabling respiratory or pulmonary impairment. While the lay evidence shows that the miner suffered from symptoms such as smothering and coughing, it does not establish that Mr. Smith could not have performed his usual coal mine work despite such symptomatology. I give Mrs. Smith's testimony little weight because she failed to acknowledge her prior testimony at the coroner's inquest regarding the miner's heart condition. Thus, I am unable to determine if the miner's heart condition contributed to the manifestation of his respiratory symptoms as described by the wit-

nesses. Additionally, it appears that the miner drank a large quantity of alcohol. I am not able to determine the impact that this may have had upon the miner's physical condition. Furthermore, Mr. Smith was able to retain employment at A. B. Dick Company until his death. I realize that the work at A. B. Dick was less strenuous than the work requirements of coal mining. However, I reiterate my finding that Claimant has not met her burden of proof in establishing that her husband had a totally disabling respiratory or pulmonary impairment which would have prevented him from doing his former work at Mulligan Coal Company.

Since Claimant has not established that the miner was totally disabled by a respiratory or pulmonary impairment, she is not entitled to the presumption of pneumoconiosis under § 718.202(a)(3), or any other provision under Part 718 of the regulations. Finally, Claimant has not shown that the miner died from a respirable disease; therefore, she is not entitled to the presumption of death due to pneumoconiosis found under § 718.303.

ENTITLEMENT

Having considered this claim under the applicable sections of Part 718, by reason of the foregoing, Claimant, Virginia Smith, is not entitled to benefits under the Act.

ATTORNEY'S FEES

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of Virginia Smith for benefits under the Act is hereby denied.

DANIEL LEE STEWART
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, 1111 Twentieth Street, N.W., Suite 757, Washington, D.C. 20036.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration

Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

Washington, D.C.

November 11, 1981

Virginia Smith
845 W. Agatite
Chicago, Ill. 60640

Claim Number: 403-07-4041
Lindel Smith

Dear Claimant:

We have carefully reviewed the evidence in your claim under the Black Lung Benefits Reform Act of 1977. This evidence does not show that you qualify for Black Lung benefits. Your claim is therefore denied.

To qualify for black lung benefits, you must show that:

1. the miner had pneumoconiosis (black lung disease); *and*
2. the miner's black lung disease was caused at least in part by coal mine work; *and*
3. the disease caused the miner's death or caused total disability prior to the miner's death; *and*
4. you are an eligible survivor of a coal miner (surviving spouse, divorced spouse, child, parent, brother, or sister); *and*
5. you were dependent on the miner at the time of the miner's death.

You must meet *all five* of the above conditions to qualify for black lung benefits.

You do not qualify for benefits because the evidence in your claim

1. (X) does not show the miner was suffering from pneumoconiosis (black lung disease) at the time of death.
2. (X) does not show the disease was caused at least in part by the miner's coal mine work.
3. (X) does not show the disease caused the miner's death, and it did not cause the miner to be totally disabled prior to death.
4. ( ) does not show you are an eligible survivor of the deceased miner.
5. ( ) does not show you were dependent on the miner at the time of the miner's death.

If you disagree with this determination you may further pursue your claim if you:

(1) SUBMIT ADDITIONAL EVIDENCE;

You may refer to the enclosed "Guide for Submitting Additional Evidence" (CM-1000b) on which we have checked the items that will be helpful in pursuing your claim. You must send the evidence to us within 60 days of the date of this letter. If you need more time, you must request approval from this office.

OR

(2) REQUEST A HEARING ON YOUR CLAIM;

Your claim can be scheduled for a formal hearing conducted by the Office of Administrative Law Judges of the United States Department of Labor. An informal conference may be scheduled prior to the hearing if it appears a conference would be helpful in resolving your claim. If you want a hearing, you must make your request within 60 days of the date of this letter unless you notify us that you intend to submit additional evidence.

If you intend to pursue your claim, you may wish to obtain a representative in order to be sure that your rights

are fully protected. We will furnish copies of all the evidence in your claim to any representative you choose. If you obtain a representative, you must complete the enclosed authorization (CM-1078) and return it to this office.

If you do not take any action within 60 days, your claim will be closed.

Sincerely,

Claims Examiner

Enclosure(s): CM1000b, CM1078

NOTE: You have the right to ask for reconsideration of your claim if you write to this office within one year from the date of this letter, but *only* if your condition has changed, or a mistake was made when your claim was denied. If you request reconsideration, you *must* submit proof to support your request.

APPENDIX D

No. 91-3978

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA SMITH, (WIDOW OF LINDEL SMITH, DECEASED),	)	
Petitioner,	)	April 3, 1992
v.	)	ORDER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondent.	)	

BEFORE: KENNEDY and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

D-2

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA SMITH (widow of LINDEL SMITH) (deceased),	
Petitioner-appellant,	BRB No. 86-0443 BLA
	OWCP No. 407-07-1654
v.	91-3978
	October 21, 1991
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	
Respondent-appellee.	

NOTICE OF APPEAL

VIRGINIA SMITH hereby petitions this Honorable Court for review of the Order of the United States Department of Labor Benefits Review Board affirming the previous ruling of the Administrative Law Judge denying her claim for benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* The Benefits Review Board Order was entered on August 22, 1991.

Ann L. Gibson, One of the
Attorneys for the Petitioner

OF COUNSEL

Coffield Ungaretti & Harris
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA SMITH, WIDOW OF LINDEL SMITH,	)	
Petitioner,	)	
v.	)	No. 91-3978
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondent.	)	

DIRECTOR'S RESPONSE TO MOTION FOR SUBSTITUTION OF PARTIES DUE TO DEATH OF PETITIONER

Pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure, the Director, Office of Workers' Compensation Programs, United States Department of Labor, by counsel, submits the following response to the Petitioner's Motion for Substitution of Parties due to Death of Petitioner.

On January 14, 1986, an administrative law judge with the Department of Labor denied Petitioner Virginia Smith's claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45 (1981). Smith sought review by the Benefits Review Board, the agency's appeal board. Smith died on May 14, 1988, before the Board issued its decision adverse to her on August 22, 1991. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporating section 21(c) of the Longshore and Harbor Workers' Com-

pensation Act, 33 U.S.C. § 921(c), requires that a petition for review of an order of the Board be filed in the court of appeals within 60 days after the issuance of the Board's order. That sixty-day appeal period is jurisdictional; failure to timely file requires dismissal. *Danko v. Director, OWCP*, 846 F.2d 366 (6th Cir. 1988). A Notice of Appeal was filed with this Court in the name of "VIRGINIA SMITH (widow of LINDEL SMITH) (deceased)" on October 21, 1991.

By motion dated December 3, 1991, the five adult children of Smith moved to be substituted as her personal representatives pursuant to Rule 43 of the Federal Rules of Appellate Procedure. The basis for their motion is the death of Virginia Smith on May 14, 1988. This motion is the first notice of the Director has received of Smith's death.

The Director is compelled to point out that the Court may lack jurisdiction over this case because the real party in interest has not filed either a timely petition for review or a timely motion to amend. Rule 15 of the Federal Rules of Appellate Procedure requires that a petition for review of an agency order be filed "within the time limits prescribed by law" and that the petition "shall specify the parties seeking review." The requirements of Rule 15 for obtaining review of an administrative decision track those of Federal Rules for Appellate Procedure 3 and 4 for obtaining review of a district court decision.

The Supreme Court of the United States has held that the failure to name a party in a notice of appeal "constitutes a failure of that party to appeal." *Torres v. Oakland Scavanger Co.*, 108 S.Ct. 2405, 2407 (1988). The Court characterized Appellate Rules 3 and 4 as establishing a "singular jurisdictional threshold" and construed the specificity requirement of Rule 3(c) as a jurisdictional prerequisite designed "to provide notice both to the op-

position and to the court of the identity of the appellant or appellants." *Id.*, at 2409. The Court noted the specificity requirement should be liberally construed when determining compliance—accepting papers which are the functional equivalent of a notice of appeal, "however inartful," as long as they are timely filed or amended pursuant to Rule 4. *Id.* However, "[t]he failure to name a party in a notice of appeal is more than excusable 'informality;' it constitutes a failure of that party to appeal." *Id.*, at 2407. If an individual or entity is not named or otherwise designated within the time limits for filing an appeal, then the court of appeals is deprived of jurisdiction over the unnamed parties.[1] *Id.*, at 2407-09. The Third Circuit has determined the jurisdictional principles discussed in *Torres* were applicable to black lung cases under Federal Rule of Appellate Procedure 15. *Kowaleski v. Director*, OWCP, 879 F.2d 1173, 1175-77 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1114 (1990).

Subsequent to *Torres*, this Court noted "the safest way of securing an appeal is for the party or parties seeking appeal to state in the *body* of the notice of appeal the name of each and every party taking the appeal." *Minority Employees v. Tennessee Department of Employment Security*, 901 F.2d 1327, 1335 (6th Cir. 1990) (en banc). The Court noted, "As long as the name appears on the face of the document, the designation may fall within the language of Rule 3(c) that '[a]n appeal shall not be dis-

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[1] In *Torres*, the Court held the use of the phrase "*et al.*" was too vague to provide adequate notice to the opposing party or to the court that Torres was included in the appeal. Even though the omission of Torres was merely a clerical error, the Court rejected application of the good cause exception under Rule 2 or a "harmless error" analysis, stating the jurisdictional requirements of Rules 3 and 4 may be construed liberally, but they cannot be waived. 108 S.Ct. at 2409.

missed for informality of form or title of the notice of appeal.' " *Id.* Moreover, the circuit courts seem predisposed to allowing a defective notice of appeal to be cured by filing additional documents as long as they are filed within the time limit for filing a notice of appeal. *See Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769, 772 (10th Cir. 1991); *Masquerade Novelty, Inc. v Unique Industries, Inc.*, 912 F.2d 663, 664-65 (3d Cir. 1990); *Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990). To allow amendment outside the appeal period would effectively extend the period of time for filing a notice of appeal or petition for review which is explicitly prohibited by Federal Rule of Appellate Procedure 26(b). *Minority Employees*, 901 F.2d at 1337; *Kowaleski*, 879 F.2d at 1177.

Since Smith was no longer alive at the time of the Board's decision,[2] an appeal should not have been taken in her name personally. Where a party dies prior to filing an appeal, Rule 43(a) of the Federal Rules of Appellate Procedure states, in part

> If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

Fed.R.App.P. 43(a). In general, this rule would only seem to apply when the party in question dies after issuance of the underlying decision but prior to the expiration of the appeal time. Only after a decision has been issued can

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[2] The Board's regulations, 20 C.F.R. Parts 801 and 802, do not require, and make no provision for, the substitution of parties in the event of death.

be a party considered to be "entitled to appeal." In this case, where Virginia Smith's children were the only individuals "entitled to appeal," the appeal should have been taken in their names. Even if Rule 43(a) were applicable, moreover, the appeal in this should have been taken in the names of Smith's personal representative or attorney of record.[3] The petition for review gives no indication that Virginia Smith is deceased, and consequently, not personally pursuing this appeal.[4] The motion for substitution is the first notice received by the Director of Smith's demise and it was not received within the 60-day appeal period.

In our view, dismissal of this case for lack of jurisdiction would be a particularly harsh result. All of the parties to a black lung claim are aware, if not actually then constructively, of the order by which individuals may succeed to the right to black lung benefits in the case of death. 20 C.F.R. § 725.545. Each case appealed to a federal cir-

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[3] The Director does not challenge the appointment of the five adult children of Virginia Smith as her personal representative as they appear to be her beneficiaries under the Black Lung Benefits Act. *See* 20 C.F.R. §§ 725.504 725.545. Although Appellate Rule 43(a) allows for the attorney of record to file an appeal in the event of a party's death and no personal representative steps forward, this provision is not applicable here since the attorney who filed the notice of appeal with this court is not Smith's attorney of record before the Board. Since current counsel was not appointed by Smith, they could not act on her behalf. *See Kowaleski*, 879 F.2d at 1177; *see also*, *U.S. v. Chin*, 848 F.2d 55, 57 (4th Cir. 1988) (in a criminal proceeding, attorneys who represented accused in the criminal action had no authority to act after his death; therefore, his widow as his personal representative is not bound by the attorneys' actions).

[4] An argument could be made that the use of "(deceased)" in the caption of the Notice of Appeal referred to Virginia Smith, and therefore, the Director and the Court had notice. However, in all subsequent pleadings, the term "deceased" clearly refers to Lindel Smith.

cuit court involves only a single order of the Benefits Review Board, affirming or reversing a decision on a claim for benefits. The problems addressed by the Supreme Court in *Torres* are thus not present in black lung benefits litigation.

The Third Circuit's decision in *Kowaleski*, in which the court was faced with a highly unusual set of facts, need not be read to the contrary. In that case, the miner's wife and sole dependent, Anna Kowaleski, predeceased the miner. Prior to the administrative hearing, the miner, Peter Kowaleski, also died. In his subsequent decision, the administrative law judge inadvertently captioned the case in the name of Anna Kowaleski, widow of Peter Kowaleski. Counsel for the miner continued to pursue the claim in the name of Anna Kowaleski. The court found no evidence that Anna Kowaleski or the executor of her estate ever authorized counsel to represent her interests in any matter. Therefore, the court dismissed the petition before it for lack of a real party in interest. In so finding, the court relied on Appellate Rule 15(a) and the Supreme Court's *Torres* decision (*see* discussion *supra*). Noting a motion to amend a petition for review to name a person not already a party to the appeal must be filed within the time limits for filing the original appeal—within 60 days of the entry of the Benefits Review Board decision; the Third Circuit implied that if the case had been continued in the name of the deceased miner *or* in behalf of his estate, the court may have retained jurisdiction.[5] 879 F.2d at 1176-77.

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[5] The Second Circuit has retained jurisdiction where the appellant died after the action was begun but prior to filing this appeal, finding the lack of a motion for substitution was not fatal since no suggestion of death was made to the district court. *Ciccone v. Secretary of the Dept. of Health and Human Services*, 861 F.2d

(Footnote continued on following page)

The Director believes that the remedial purposes of the Black Lung Benefits Act may be best served by permitting the late substitution of Virginia Smith's personal representatives; however, if the Federal Rules of Appellate Procedure are construed strictly, the Court may lack jurisdiction to hear this claim.

The Director does not object to the motion for the substitution of Virginia Smith's children. The purposes of the Black Lung Benefits Act are, in our view, best served by allowing the litigation of this appeal. Because the court is bound to consider jurisdiction despite the absence of an affirmative request by the Director, however, and in light of the unsettled law in this area, we simply note the potential jurisdictional problems for the Court's information.

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[5] *continued*
14, 15 n.1 (2d Cir. 1988). In reaching this conclusion, however, the court relied on an earlier decision where the court proceeded to hear a case because the record below did not yet reflect the death of a party, but that party happened to be the appellee, not the appellant. *Coffee v. Cutter Biological*, 809 F.2d 191, 193 n.1 (2d Cir. 1987).

Respectfully submitted,

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DONALD S. SHIRE
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APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-3978

VIRGINIA SMITH, WIDOW OF LINDEL SMITH,
Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF OF THE RESPONDENT

STATEMENT OF JURISDICTION

The Petitioner's jurisdictional statement is correct. As we have previously noted, there remains a question whether a real party in interest filed a timely petition for review (*see* Director's Response to Motion for Substitution of Parties due to Death of Petitioner). This Court may lack jurisdiction.

STATEMENT OF THE ISSUE

Whether the autopsy report constitutes evidence relevant to the existence, cause and extent of Lindel Smith's respiratory impairment, thus precluding Virginia Smith from establishing her entitlement by lay evidence alone.

STATEMENT OF THE CASE

A. *Course of the Proceedings.*

This case arises from the filing of an application with the Department of Labor ("DOL") for survivor's benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1982) ("the Act"), by Virginia Smith ("Smith" or "claimant") on March 6, 1981. Her entitlement to benefits is derived from her husband Lindel Smith's, alleged twenty years of coal mine employment and resulting disabling respiratory impairment due to that coal dust exposure. Director's Exhibit ("DX") 1. By letter dated November 11, 1981, DOL informed claimant her application was denied. Smith requested a formal hearing before an administrative law judge.

Administrative Law Judge Daniel Lew Stewart ("the ALJ") conducted a hearing on July 31, 1985 in Chicago, Illinois. On January 14, 1986, the ALJ issued his Decision and Order denying the claim for benefits. Smith filed a timely appealed [sic] with the Benefits Review Board ("the Board"). The Board issued its Decision and Order affirming the denial of benefits on August 22, 1991. Smith filed a petition for review with this Court on October 21, 1991. On December 4, 1991, Smith filed a Motion for Substitution of Parties due to Death of Petitioner, along with an opening brief. The Director filed his response to that motion, noting a potential jurisdictional problem, on December 13, 1991. The Court has not yet ruled on that motion.

B. *Decisions Below.*

In his decision denying benefits, the ALJ found the Social Security Administration earnings record for Lindel Smith ("the miner") was the most credible evidence regarding his coal mine employment history. Based on these records and crediting only those quarters where the miner earned at least $50.00, the ALJ determined claimant had proved 12 and one-quarter years of coal mine work. Addressing entitlement, the ALJ found the record was "void of medical evidence that is directly relevant to the existence or extent of a respiratory disability." Decision and Order, at 5. In deciding first whether the miner suffered from pneumoconiosis, the ALJ turned without explanation to section 718.305(a). Noting that this claim was filed before January 1, 1982 and lacked relevant medical evidence, the ALJ reviewed the lay testimony to see if it established the existence of a totally disabling respiratory or pulmonary impairment. The ALJ concluded:

> While the lay evidence shows that the miner suffered from symptoms such as smothering and coughing, it does not establish that Mr. Smith could not have performed his usual coal mine work despite such symptomatology.

Decision and Order, at 6. The ALJ gave claimant's testimony "little weight because she failed to acknowledge her prior testimony at the coroner's inquest regarding the miner's heart condition." *Id.* The ALJ concluded claimant had not met her burden of proving the miner had a totally disabling respiratory impairment which would have prevented him from doing his usual coal mine work, and thus was not entitled to a "presumption" of pneumoconiosis. Moreover, the evidence did not establish the miner's death was due to pneumoconiosis. Therefore, the ALJ denied benefits. Smith appealed to the Board.

In affirming the denial, the Board stated 20 C.F.R. § 718.305 contains only one presumption of entitlement at subsection (a); subsection (b) merely provides a method for establishing the existence of a totally disabling respiratory or pulmonary impairment by affidavits. In order to be eligible for the presumption that the miner's totally disabling respiratory impairment is due to pneumoconiosis at 20 C.F.R. § 718.305(a), a miner must have at least 15 years of coal mine employment. As only 12 and one-quarter years of covered employment were established and this finding was not challenged on appeal, the Board found the section 718.305 presumption not applicable to this claim. Moreover, the Board determined remand was unnecessary since it held the reference to the miner's lungs in the autopsy report was legally sufficient to preclude the use of lay testimony. The medical evidence did not establish the existence of pneumoconiosis; therefore, the Board affirmed the denial of benefits.

C. *Statement of the Facts.*

On her application for benefits, Smith stated her husband worked in coal mining for twenty years. DX 1. She reported he worked for "Shoron Coal Co." from 1936 to approximately 1946 and for "Mulligan Coal Co." from about 1946 to 1956. DX 2. The Itemized Statement of Earnings from the Social Security Administration recorded 28 quarters of at least fifty dollars of earnings from Shearn Coal Company from 1937 through the third quarter of 1947 and 23 quarters of earnings from J.F. Mulligan Coal Company from the third quarter of 1947 through the second quarter of 1954.[1] DX 20.

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[1] Counting each calendar quarter where the miner earned at least $50.00 only once, the social security records document 50 quarters,

(Footnote continued on following page)

The only medical evidence of record is the death certificate and the autopsy report. DX 10, 11. Both reports were signed by Dr. Matthew Price on August 22, 1960 and state Lindel Smith died on August 22, 1960 at age 39 due to carbon monoxide poisoning. The autopsy report notes the internal examination revealed:

1) Heart – slight enlargement of [right] ventricle. Coronaries patent. No evidence of occlusion.
2) Lungs – passive congestion.
3) Spleen & Liver – very pink [with] areas of reddish-blue.
4) Rest of organs showed nothing of note.

DX 11.

Testimony of Virginia Smith.

On July 31, 1985 Virginia Smith testified she met Lindel Smith in 1940 and they were married one year later on February 25, 1941. Transcript ("Tr.") 16-17. She stated from the time they met until approximately 1947, the miner worked mostly underground for Shearn Coal Company "loading coal into the little railroad cars with a shovel." Tr. 18. She recollected that each day he left home with clean coveralls then returned covered in black coal dust. Tr. 20. In 1947 Shearn Coal Company was sold out to J.F. Mulligan Coal Company and her husband worked for Mulligan until early 1955 when he was laid off. Tr. 22, 25. At Mulligan, the miner worked at the strip mine drilling holes and setting dynamite blasts. Tr. 35. Smith stated at least once a week she and her children went

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[1] *continued*
or 12 and one-half years, of coal mine employment. The ALJ found these records established 12 and one-quarter years. In this instance, the discrepancy of one-quarter is not significant.

over to the mine and watched her husband work. Tr. 33/34. She said the drill her husband used was too heavy for her to lift and that her husband dragged the drill across the ground. Tr. 46. After he left the mine, the miner did light janitorial work which involved sweeping, straightening aisles, picking up and moving things around. Claimant related that the miner found this job to be the easiest work he ever did. Tr. 30.

Regarding his physical condition, claimant testified that around 1947 the miner "got a cough. It kept—continuously—continually getting worse. . . . It got worse as he got older." Tr. 28. Also she noted "he was just tired all the time. He never did anything but go to work and come home. He didn't have any activities. He never played with the children. Most of the fathers play ball with their boys." Tr. 29. Claimant stated her husband spit up black colored phlegm which got lighter in color after he left the mines. *Id.* She stated climbing stairs and carrying groceries tired out her husband. After 1947 he no longer went dancing, an activity he had previously enjoyed.

Smith stated her husband never went to a doctor for any respiratory problems. When questioned whether the miner had a serious heart condition, Smith said to her knowledge her husband did not have such a condition. Moreover, to her knowledge, his military deferments were not due to any heart condition. Tr. 40-41. Later, she stated, "I had been told that he had a heart condition when he was a baby." Tr. 42.

When questioned regarding the veracity of statements she had made at the coroner's inquest in connection with her husband's death, Smith stated she did not recall testifying, "To be honest with you, I don't remember a lot that happened during that time." Tr. 42. When it was explained that the inquest was conducted on August 23,

1960, the day after her husband died, Smith stated, "I know what you're talking about but like I say, my mind went blank during that time. There is a lot I don't remember." Tr. 44. When asked if she remembers testifying about her husband's heart condition, Smith responded, "I'm not saying that I didn't, but I don't remember." Tr. 42-43.

At the coroner's inquest, held August 23, 1960 in Chicago, Illinois, for the purpose of determining if Lindel Smith's death was accidental or suicide, Virginia Smith had testified as follows:

> Q (by Deputy Coroner Capuzi): What was his mental condition like—good, fair or poor?
> A (by Virginia Smith): Well, he never complained, so I guess it was good.
> Q: What about his [physical][2] condition?
> A: Well, he never went to a doctor, and he hadn't for years although he did know he had a heart condition and the doctor told him that.
>
> And it was one of the reasons for not going into the service—was because he did have a heart condition.

DX 11, at 7.

Testimony of Jerry Smith.

Jerry Lynn Smith, son of Lindel and Virginia Smith, testified. Jerry Smith was born on June 18, 1942 and was eighteen years old when his father died. Tr. 50-51. Regarding his father's physical condition, the witness said

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[2] The transcript actually reads "Q What about his mental condition?" Considering the previous question and Smith's response to this question it seems clear the question contains a transcribing error and Smith was questioned regarding her husband's physical condition.

> Well, my father was always, from my memory, was a weak man. No physical activities with me or my three brothers. Never played, run, played ball or anything like that. Just always very weak.

Tr. 51-52. Furthermore, he stated his father coughed a lot and frequently spit up. Tr. 52. The witness did remember watching his father when he worked at a strip mine setting blasts and cleaning away the dirt from the coal. Tr. 56. He did not recall his father taking time off from work for illness. Tr. 57.

Testimony of Ronald Noel.

Ronald Noel testified he met Lindel Smith in the late summer of 1957 when he came to work at the A.B. Dick Company in Chicago, Illinois. Tr. 62. He stated they were friends both at and outside of work until Smith's death in 1960. Having observed Smith working at the A.B. Dick Company, Noel described Smith's job duties

> he pushed a little wagon around, like a box on wheels and emptied paper in that, paper cups and pieces of paper and things and dumped the into the box that he rolled around.
> Q (Attorney Wild): Did—when he was emptying garbage, would you have any way of knowing the weight of the items—
> A (Noel) No, not exactly the weight. But it wasn't very heavy because it was a wastepaper can or whatever it would weigh with a few paper cups or pieces of paper from the area was in there.

Tr. 64. Noel stated Smith operated "a scrub machine that was motor driven, power driven. He didn't have to push it or anything. All he did was guide it around . . ." Tr. 65. Furthermore, Noel noted the cart the miner pushed around "seemed to be pretty light, easy to push." *Id.* From their first meeting, Noel noticed Smith had prob-

lems breathing, coughed a lot and coughed up phlegm. Tr. 66. Finally, Noel observed the miner was only able to work about an hour before stopping to rest. Tr. 68.

Testimony of Randall Hill

Randall Hill testified he was a friend of Jerry Smith whom he met in 1956 at age fourteen. Through Jerry Smith, he had met Lindel Smith. Tr. 71. Hill stated Lindel Smith "seemed in ill-health. He was always going into his coughing spasms and very short winded. Couldn't walk very far and he had to sit down right away." Tr. 72. He observed the miner spitting up a dark phlegm. *Id.* Hill said he never observed Lindel Smith doing any physical activity other than playing the guitar. "He used to sing and play and maybe five to ten minutes and try to sing a song and start coughing and have to put it down." Tr. 73.

STANDARD OF REVIEW

This Court's scope of review of decisions of the Benefits Review Board is limited in nature. *York v. Benefits Review Board*, 819 F.2d 134, 136 (6th Cir. 1987). The purpose of this review is to determine whether the Board adhered to its statutory scope of review, which requires it to affirm an administrative law judge's decision if it is supported by substantial evidence and is in accordance with law. This Court has defined substantial evidence as "more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 488 (6th Cir. 1985) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). "The findings of fact in the decision under review by the Board shall be conclusive" under these circumstances. 33 U.S.C. § 921(b)(3)

as incorporated by 30 U.S.C. § 932(a); *see Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 198 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 254 (6th Cir. 1983); *Riley v. National Mines Corp.*, 852 F.2d 197, 198 (6th Cir. 1988); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 303 (6th Cir. 1987).

ARGUMENT

THIS CASE MUST BE REMANDED TO THE ALJ FOR A PROPER DETERMINATION OF WHETHER THE LAY EVIDENCE ESTABLISHES THAT THE MINER WAS TOTALLY DISABLED AT THE TIME OF HIS DEATH DUE TO A RESPIRATORY IMPAIRMENT ARISING OUT OF HIS COAL MINE EMPLOYMENT.

Since Mrs. Smith's claim was filed after March 31, 1980, the ALJ correctly applied the regulations at 20 C.F.R. Part 718. 20 C.F.R. § 718.2. Under those regulations, she must prove that the miner suffered from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that he was totally disabled at the time of his death by, or that he died due to, pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 820 (6th Cir. 1989); 20 C.F.R. § 725.212(a)(3)(ii). "The claimant bears the burden of proving each of these elements by a preponderance of the evidence, except insofar as he is aided by a presumption." *Adams*, 886 F.2d at 820.

The primary issue in this case is whether Smith is aided by a presumption. Smith argues that she is entitled to the benefit of the presumption set forth at section 411(c)(4) of the Black Lung Benefits Act, 30 U.S.C. § 921(c)(4); although invocation of this presumption is premised on proof of 15 years of coal mine employment, Smith argues that the ALJ erred in finding only 12 and ¼ years. Smith also argues that she is entitled to a presumption which she derives from section 413(b) of the Act, 30 U.S.C. § 923(b),

by means of which proof of a totally disabling respiratory impairment by lay evidence will give her a presumption of entitlement. Finally, Smith argues that the ALJ erred in finding that the evidence of record was insufficient to establish that the miner suffered from a totally disabling respiratory impairment prior to his death.

A. Smith has waived her right to allege error in the ALJ's finding regarding the length of the miner's coal mine employment. In any event, the ALJ's finding is proper and Smith is therefore not entitled to invocation of the section 411(c)(4) presumption.

Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4), provides a rebuttable presumption that a miner died due to pneumoconiosis or was totally disabled by pneumoconiosis at the time of his death, if the miner was employed for fifteen years or more in the coal mines, an x-ray of the miner's is read as negative for complicated pneumoconiosis, and other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment. For claims filed after March 31, 1980, section 718.305 is the applicable regulation implementing this statutory language. Section 718.305(a) sets out the criteria to be met in order to invoke this rebuttable presumption of total disability or death due to pneumoconiosis, and like its statutory predicate, includes a requirement that the miner have been engaged in coal mine employment for 15 years.[3]

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[3] 20 C.F.R. § 718.305(a) states in pertinent part:

> If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of §718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or

(Footnote continued on following page)

Smith urges that the ALJ erred in failing to credit her own testimony that the miner performed coal mine employment for 15 years. Although she made no such argument before the Board, petitioner now attempts to argue that alleging error in the ALJ's treatment of Smith's testimony implicitly raised an issue regarding length of coal mine employment finding. Under the Board's Rules of Practice and Procedure, 20 C.F.R. Part 802, a petitioner represented by an attorney[4] must present the Board with the specific issues to be considered on appeal and argument in support of the proposed outcome. 20 C.F.R. § 802.211(a); *see also Fish v. Director, OWCP*, 6 Black Lung Rep. (MB) 1-107, 1-109 (Ben. Rev. Bd. 1983) ("An argument framed in terms of the decision below . . . is a threshold requirement for Board review."). Otherwise, the Board will decline to address clear and unequivocal findings of an administrative law judge which are not contested. *Skrack v. Island Creek Coal Co.*, 6 Black Lung Rep. (MB) 1-710, 1-711 (Ben. Rev. Bd. 1983). Here, the Board found claimant, by counsel, had not challenged the ALJ's length of coal mine employment finding.

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[3] *continued*

pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. . . .

[4] The Board has established a different procedure for an appeal by a *pro se* claimant, allowing a single statement of disagreement with an administrative law judge's decision to invoke Board review of the general issue of whether substantial evidence supports the underlying decision. *Antonio v. Bethlehem Mines Corp.*, 6 Black Lung Rep. (MB) 1-702, 1-704 (Ben. Rev. Bd. 1983). This procedure is consistent with the Board's regulations providing for adoption of informal procedures for unrepresented claimants. *See* 20 C.F.R. §§ 802.220, 802.211(e).

This Court has held that it will not review an administrative law judge's decision on the merits when the appealing party failed to raise any specific claims before the board in the first instance. *Hix v. Director, OWCP*, 824 F.2d 526, 527-(6th Cir. 1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 447 (6th Cir. 1986). In *Hix*, this Court held "that even if a claimant properly appeals some issues to the Board, the claimant may not obtain review of the ALJ's decision on any issue not properly raised before the Board." 824 F.2d at 527. The Court thus affirmed the denial of benefits where the claimant had alleged error concerning invocation of a disability presumption, but no error concerning finding that the presumption had been rebutted. Therefore, where the petitioner had failed to challenge an administrative law judge's findings that precluded entitlement before the Board, the Court held the claimant waived his right to raise the issue for the first time on appeal to this Court. *Id.* at 527-28.

Since Smith failed to assert to the Board any error by the ALJ regarding the 12 and one-quarter years coal work history finding, the Board properly affirmed this finding as unchallenged on appeal. This Court cannot now review the ALJ's factfinding as that issue must be deemed to have been waived. Moreover, even if the Court did review the ALJ's finding of fact, substantial evidence clearly supports his determination.

This Court has held, the claimant bears the burden of proving the length of the miner's coal mine employment as that fact is relevant to the issue of eligibility for benefits. *Griffith v. Director, OWCP*, 868 F.2d 847 (6th Cir. 1989); *Engle v. Director, OWCP*, 792 F.2d 63, 64 n. 1 (6th Cir. 1986); *Miniard v. Califano*, 618 F.2d 405, 406 (6th Cir. 1980). The Act does not contain specific methods for computing the length of a miner's employment. *See Director, OWCP v. Congleton*, 743 F.2d 428, 429-30 (6th Cir.

1984). An administrative law judge's finding as to the length of coal mine employment therefore must be affirmed if it is based on a reasonable method of computation, and is supported by substantial evidence. *See Congleton*, 743 F.2d at 429; *Dawson v. Old Ben Coal Co.*, 11 Black Lung Rep. (MB) 1-58, 1-60 (Ben. Rev. Bd. 1988). A reasonable method is one which complies with the standards of the Administrative Procedure Act, 5 U.S.C. § 557(a)(3)(A), as incorporated by 30 U.S.C. § 932(a), which requires the administrative law judge to set forth clearly the rationale for his findings of fact and conclusions of law. *Congleton*, 743 F.2d at 429.

The Director submits that the ALJ's computation of the length of the miner's coal mine employment in this case is entirely reasonable. It was rational for the ALJ, after considering all the evidence, to give greatest weight to the Social Security Administration Itemized Statement of Earnings (DX 20) which provides a listing of employers and the quarterly earnings paid. Reliance on these records and crediting those calendar quarters where a miner earns at least fifty dollars has been found to be a reasonable means of determining an individual's work history. *See Justice v. Island Creek Coal Co.*, 11 Black Lung Rep. (MB) 1-91, 1-92 (Ben. Rev. Bd. 1988); *Tackett v. Director, OWCP*, 6 Black Lung Rep. (MB) 1-839, 1-841 (Ben. Rev. Bd. 1984); *Combs v. Director, OWCP*, 2 Black Lung Rep. (MB) 1-904, 1-906 (Ben. Rev. Bd. 1980).

It was also rational for the ALJ to give little weight to the claimant's testimony regarding her husband's coal mine employment since it was imprecise. Generally, Smith testimony corroborated the social security record which reflected earnings from coal companies between 1937 and 1954. Although, Smith recalled her husband worked in the mines in 1940, 1949 and 1950 when the earnings record contained no earnings from a coal mine company, the ALJ

reasonable concluded these allegations of inaccuracies were not entitled to great weight. The social security records provide a quarterly breakdown of earnings over the years, and demonstrate sporadic work for the companies that employed the miner. Smith testified only that she recalled sending someone to the mines to get her husband once in September of 1949 and again in February of 1950 because she needed him to take her to the hospital. Tr. 26-27. This testimony at best could establish two days of coal work. Her sparse testimony is insufficient to prove the miner was working at the mines on a regular basis during periods where the social security record reflects non-coal mine employment or no employment. Accordingly, the ALJ reasonably determined the length of the miner's coal mine employment was 12 and one-quarter years.

B. Claimant failed to establish 15 years of coal mine employment; therefore, the ALJ erred in applying the criteria at 20 C.F.R. § 718.305 to this claim. No other presumption exists under which claimant can claim benefits.

Claimant also argues that she is entitled to a presumption of entitlement through section 413(b) of the Act. Claimant contends that the ALJ properly recognized this "presumption" when he considered the evidence pursuant to 20 C.F.R. § 718.305(b). In our view, although the ALJ correctly viewed this case as one dependent on the lay evidence, he erred in considering it under 20 C.F.R. § 718.305. Contrary to petitioner's argument, section 718.305 only contains one presumption and that presumption has a prerequisite of at least 15 years of coal mine employment.

Section 413(b) of the Act permits a finding that a deceased miner was "totally disabled due to pneumoconiosis" on the basis of lay evidence. This provision, added to the

Act in 1977 in recognition of the difficulty in obtaining medical evidence in such cases, is not limited to claimants who establish fifteen years of coal mine employment. However, it does not provide any presumption of entitlement as claimant suggests. Rather, it only allows a miner's survivor, in cases where there is no relevant medical evidence, to establish the necessary elements of entitlement through lay evidence. Nowhere in the section is there support for relieving the claimant of the burden of proving each of those elements.

Claimant suggests that section 718.305(b) implements section 413(b) *and* provides a presumption of causation regardless of the length of a miner's coal mine employment whenever a miner's survivor can establish a totally disabling respiratory impairment by lay evidence. As we have shown, however, section 718.305 serves only to implement the section 411(c)(4) presumption, which requires 15 years of coal mine employment. When the section 718.305 regulatory language is properly applied, a claimant must satisfy three criteria before the presumption is invoked: 1) the miner worked at least 15 years in the coal mines; 2) there is no evidence of complicated pneumoconiosis; and 3) other evidence demonstrates the existence of a totally disabling respiratory impairment. 20 C.F.R. § 718.305(a). Only when all three are met is there a rebuttable presumption that "at the time of death such miner was totally disabled by pneumoconiosis." Subsection (b) provides a method for using lay evidence while subsection (c) provides methods for using medical evidence to demonstrate by other evidence the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. § 718.305(b), (c). Subsection (b) thus provides only one of the predicates necessary to invoke the entitlement presumption; without the 15 years of coal mine employment, subsection (b) is meaningless.

Under Part 718, the regulatory section for establishing the existence of pneumoconiosis does not explicitly provide for using lay evidence except by incorporating the fifteen-year presumption.[5] Under 20 C.F.R. § 718.202, titled "Determining the existence of pneumoconiosis," pneumoconiosis may be established by producing evidence which satisfies the appropriate medical criteria, 20 C.F.R. § 718.202(a)(1), (2), (4), or by qualifying for one of three presumptions, 20 C.F.R. § 718.202(a)(3). Although this section thus does not explicitly provide for the use of lay evidence, subsection (c) states, in part:

> A determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony. Nor shall such a determination be made upon a claim involving a deceased miner filed on or after January 1, 1982, solely based upon the affidavit(s) (or equivalent sworn testimony) of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

20 C.F.R. § 718.202(c). The clear purpose of section 718.202(c) is to properly implement the requirements of section 413(b). Accordingly, the only logical inference to draw from section 718.202(c)'s explicit exclusion of using lay evidence alone to establish entitlement in claims filed on or after January 1, 1982, is that for claims filed prior to that date, lay evidence alone could establish "legal" pneumoconiosis, *i.e.* "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related

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[5] Section 718.204(c)(5) does expressly provide for using lay evidence to prove that the miner had a totally disabling respiratory impairment. That section also makes clear that absent the use of the fifteen year presumption, proving the existence of a disabling respiratory impairment under this subsection does not establish entitlement as it must still be proved that the miner's impairment was due to pneumoconiosis.

to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201; *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 304 (6th Cir. 1987). We acknowledge that the burden is a difficult one; in effect, a miner's widow must introduce lay evidence sufficient to rule out all other possible causes of respiratory impairment in order to allow the administrative law judge to draw the legal conclusion that the impairment is significantly related to coal mine employment. That difficulty alone, however, cannot create a presumption which was not specifically authorized by Congress.

Since claimant was not eligible for any of the presumptions incorporated pursuant to section 718.202(a)(3), the ALJ erred in considering the lay evidence under that section. Because the ALJ has not properly considered whether the lay evidence of record is sufficient to establish the existence of legal pneumoconiosis, and because he erred in his consideration of the evidence regarding total disability (*see* argument D, below), this case must be remanded to the ALJ for further consideration.

C. The Board erred as a matter of law in finding the autopsy report constituted "other relevant evidence" thereby precluding consideration of the lay evidence.

The petitioner argues that the Board exceeded the scope of its authority by impermissibly engaging in factfinding when it found the autopsy report constituted "other relevant evidence" precluding the use of lay testimony. In our view, determining whether the autopsy report is relevant medical evidence legally sufficient to preclude the use of lay evidence is a legal question, and therefore, appropriately within the scope of the Board's review. However, the Director agrees with petitioner that the Board erroneously concluded the report was legally sufficient to exclude consideration of lay testimony.

Section 413(b) provides that, in the case of a deceased miner where there is *no medical or other relevant evidence*, affidavits of persons with knowledge of the miner's physical condition shall be considered sufficient to establish that the miner was totally disabled due to the pneumoconiosis or that his death was due to pneumoconiosis. 30 U.S.C. § 923(b) (emphasis added). The Department of Labor has promulgated regulations implementing this provision of the Act which are set forth in 20 C.F.R. §§ 718.204(c)(5), 718.305.[6] *See also* 20 C.F.R. §§ 410.414(c), 727.203(a)(5).

The United States Court of Appeals for the Seventh Circuit has interpreted the section 413(b) phrase, "medical or other relevant evidence," to refer to evidence regarding the issue of disability. *Dempsey v. Director, OWCP*, 811 F.2d 1154, 1160 (7th Cir. 1987). This Court, citing *Dempsey*, has agreed that in order to preclude the use of lay evidence, "medical and other relevant evidence" must address the issue of disability due to a respiratory or pulmonary impairment. *Coleman v. Director, OWCP*,

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[6] 20 C.F.R. § 718.204(c)(5) states in pertinent part:

> In a case involving a deceased miner in which the claim was filed prior to January 1, 1982 where there is no medical or other relevant evidence, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total . . . disability. . . . Except as provided in § 718.305, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (c)(1), (2), (4) and (5) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis.

20 C.F.R. § 718.305(b) states:

> In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for the purposes of this section.

829 F.2d 3, 5 (6th Cir. 1987); *see also Rapier v. Secretary of Health and Human Services*, 808 F.2d 456, 458 (6th Cir. 1986); *Hillibush v. U.S. Department of Labor, Benefits Review Board*, 853 F.2d 197, 203-04, (3d Cir. 1988).[7] Thus, a survivor can prove her case by lay evidence alone unless the available medical evidence tends to prove or disprove the miner had a respiratory disability. This case-law properly interprets section 413(b). Congress amended this section in 1977 so as to alleviate

> the dilemma of survivors who, because of the absence of any relevant medical evidence *regarding the physical condition of deceased miners* cannot establish the validity of an otherwise valid claim. In most cases, the miner died many years ago, and such evidence has been lost or destroyed by the miner's physician, or is otherwise non-existent.

Dempsey, 811 F.2d at 1159, quoting H.R. Rep. No. 151, 95th Cong., 1 Sess. 20-21 (1977) (emphasis added). Thus the factfinder must consider the lay evidence alone whenever the medical evidence is not relevant to the issue of the miner's disability due to pneumoconiosis.

In this case, the medical evidence consists solely of a death certificate which lists carbon monoxide poisoning as the cause of the miner's death and the autopsy report which contains the notation, "Lungs—passive congestion." Although it is within the Board's authority to determine whether this evidence is legally sufficient to preclude the

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[7] The Director recognizes that *Dempsey* and *Coleman* involved a claim adjudicated pursuant to 20 C.F.R. § 727.203(a)(5), *Rapier* involved 20 C.F.R. § 410.414(c) and *Hillibush* involved 20 C.F.R. § 718.305(b). The Director submits that these regulatory provisions implement the same statutory provision, section 413(b) of the Act. Therefore, the standard applied by this Court under sections 727.203(a)(5) and 410.414(c) is equally applicable under sections 718.204(c)(5).

use of lay testimony, the Board erroneously concluded that this evidence was relevant. The notation regarding the miner's lungs does not supply any information as to the physical condition of the miner prior to his death with respect to any respiratory or pulmonary impairment. Moreover, while clearly not establishing the existence of pneumoconiosis, it does not tend to rule out the existence of any respiratory disease. It is the failure of the evidence to address the question of disability which makes it irrelevant in this case, not as petitioner argues, the fact that the autopsy was not conducted for the purpose of determining the presence of pneumoconiosis. As the Court noted in *Coleman*,

> a 1950 medical report indicated clear lung fields and the 1951 chest x-ray also revealed clear lung fields and was interpreted as normal. We find that this constitutes some medical evidence indicating the nonexistence of a lung impairment. Although pneumoconiosis was not known in the early 1950s, we believe that there would certainly have been some notation regarding the abnormality of the lung fields if the alleged lung impairment were of a disabling nature.

829 F.2d at 5. The medical evidence in this case does not meet this test; therefore, it clearly cannot preclude consideration of the testimony of the various witnesses. Because the Board's decision is contrary to this Court's standard set forth in *Coleman*, it must be vacated on appeal.

D. The ALJ's consideration of the lay testimony is not rational or supported by substantial evidence.

Although the ALJ purported to consider the lay evidence in this case, noting that it showed the miner was short of breath and suffered from a chronic cough, he regarded as determinative the fact that claimant "failed to acknowledge" her earlier testimony at the coroner's

inquest in 1960 regarding the existence of a heart condition. This conclusion is irrational as claimant testified she could not remember her testimony from the coroner's inquest which occurred more than twenty years ago on the day after she discovered her deceased husband's body in the garage. In light of these factors, claimant's memory lapse should not cast doubt on her entire testimony. Moreover, Smith's testimony regarding a heart condition was not inconsistent. At the coroner's inquest, she stated her husband had been told he had a heart condition and at the black lung administrative hearing, she stated he had been told this as a child. There is nothing patently contradictory in these two statements. The ALJ's determination that this testimony is entitled to little weight clearly is not reasoned or supported by the evidence.

The ALJ also found significant the fact that the miner continued to work until his death. In relying so heavily on this fact, the ALJ improperly failed to compare evidence of the physical requirements of the miner's usual coal mine employment with lay evidence concerning his respiratory symptoms and his physical limitations to determine whether total disability had been established. Such a comparison requires the ALJ to determine what the miner's usual coal mine work was, what physical functions were required to perform such work, and whether the lay evidence establishes that the miner was incapable of performing these functions. *Dempsey*, 811 F.2d at 1160; *Hillibush*, 853 F.2d at 205-06. The mere fact a miner was working at the time of death is not conclusive evidence the miner was not totally disabled. 20 C.F.R. § 718.204(e)(1). Moreover, in this instance, since the miner was not doing coal mine work at the time of death, the ALJ had to make the determination that the miner's last job was comparable to his usual coal mine work and he was capable of doing that job at the time of death before finding the

miner's employment at the time of death is a determinative factor.

Finally, the ALJ's decision is silent with respect to the testimony of the three other witnesses. As these witnesses did testify regarding the miner's physical condition and abilities, the ALJ must indicate the weight accorded this evidence if deemed to be credible.

On remand, the ALJ must determine whether the lay evidence establishes the miner suffered from a totally disabling respiratory impairment (20 C.F.R. § 718.204(c)(5)), as well as whether the evidence establishes this disabling respiratory impairment was a result of the miner's exposure to coal dust during his 12 and one-quarter years working in the coal mines (20 C.F.R. § 718.202). Only if the claimant affirmatively establishes both elements can she be entitled to benefits.[8] Accordingly, this matter must be remanded to the ALJ for appropriate findings of fact and conclusions of law. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1986).

[8] If claimant is able to prove the existence of legal pneumoconiosis, proof that the pneumoconiosis arose out of coal mine employment will be redundant. By definition, legal pneumoconiosis is a dust disease arising in part out of coal mine employment.

CONCLUSION

The Board erred in holding the autopsy report was legally sufficient to preclude consideration of the lay evidence. The ALJ erred in considering the claim under the presumption at 20 C.F.R. § 718.305 and in his consideration of the lay testimony. Since correction of the ALJ's errors requires factual findings, the Director, Office of Workers' Compensation Program, respectfully requests that the Court remand this case to the ALJ for primary consideration of the evidence.

Respectfully submitted,

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